No. 16-1220

IN THE

Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC., *ET AL.*,

Petitioners,

—v.—

HEBEI WELCOME PHARMACEUTICAL CO. LTD., *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

JONATHAN M. JACOBSON
Counsel of Record
DANIEL P. WEICK
JUSTIN A. COHEN
WILSON SONSINI GOODRICH & ROSATI, P.C.
1301 Avenue of the Americas, 40th Floor
New York, New York 10019
(212) 497-7700
jjacobson@wsgr.com

SUSAN A. CREIGHTON
SCOTT A. SHER
BRADLEY T. TENNIS
ELYSE DORSEY
WILSON SONSINI GOODRICH & ROSATI, P.C.
1700 K Street, N.W., Fifth Floor
Washington, D.C. 20006
(202) 973-8800

Attorneys for Respondents

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QUESTION PRESENTED

Whether the court of appeals correctly deferred to a formal interpretation of Chinese trade law, as presented to the federal courts by the Ministry of Commerce of the People's Republic of China on behalf of that country's government, where the Ministry's statement was "reasonable under the circumstances presented," the district court's contrary interpretation was "nonsensical" and paid no regard to China's regulatory goals, and the district court's reasons for rejecting the Ministry's interpretation were ill-founded.

PARTIES TO THE PROCEEDING

Petitioners are Animal Science Products, Inc. and The Ranis Company, Inc., plaintiffs-appellees below.

Respondents are Hebei Welcome Pharmaceutical Co. Ltd. and North China Pharmaceutical Group Corporation, defendants-appellants below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29, Hebei Welcome Pharmaceutical Co. Ltd. hereby discloses that North China Pharmaceutical Co. Ltd. is its parent company and no other publicly held corporation holds more than 10% of its stock. North China Pharmaceutical Group Corporation hereby discloses that it is a state-owned enterprise under the indirect ownership of the State-Owned Assets Supervision and Administration Commission ("SASAC") of the Hebei Province of the People's Republic of China, that Jizhong Energy Group Co., Ltd. (which is wholly owned by the SASAC) is its direct parent company, and that no publicly held corporation holds more than 10% of its stock.

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STATEMENT OF THE CASE

A. Introduction

Chinese law compelled price-fixing of Vitamin C throughout the relevant period. That was not only the conclusion of the court of appeals below. In a closely related matter, the World Trade Organization ("WTO"), agreeing with the United States, Europe, and Mexico, confirmed that "China require[d] exporting enterprises to export at set or coordinated export prices or otherwise face penalties." Chinese law thus conflicted directly with the Sherman Act.

In this litigation, for the first time in history, China appeared before an American court as an *amicus curiae*. It did so to describe what was required of Vitamin C manufacturers under its regulatory system. China explained logically how its regime commanded companies to reach coordinated export prices as a group, without the need for the government to dictate specific prices. But instead of the respect this Court has required of the formal submissions of foreign governments, the district court effectively accused China of misrepresenting its system to protect its nationals, based largely on its plainly erroneous view that China's representations to the WTO were inconsistent with its submissions in this case. Rejecting China's statements, the district court interpreted the governing regulations in a way that rendered the provisions incoherent and unworkable.

The court of appeals, properly exercising *de novo* review, analyzed China's submissions and the applicable regulations. It determined that China's analysis was reasonable and reliable, and established that China compelled conduct that conflicted with the Sherman Act.

Having found China's formal submissions to have been reasonable, the court held that that the district court had erred by not giving those submissions decisive weight. This "defer if reasonable" standard is not a standard of conclusive deference divorced from a careful analysis of the foreign government's submissions. It is, rather, a standard entirely consistent with the decisions of this Court. The decision below should be affirmed.

B. Statement of Facts

1. From October 1949, when Chairman Mao Zedong announced the creation of the People's Republic of China, through 1978, China had a "command economy." Under that system, the State, directed by the Communist Party, operated the significant industrial assets in the economy. JA137, 142. In 1978, however, under the leadership of Deng Xiaoping, China began a transition into a "socialist market economy," under which greater private ownership was permitted, subject to a variety of governmental controls. Pet. App. 58a-59a; JA139, 142, 171.

The transition to a "socialist" market economy was gradual, reflecting as it did a cultural change. The details of the transition were not embodied in specific statutes and regulations because Chinese law does not work that way. JA140-41; *see* Ignazio Castellucci, *Rule of Law with Chinese Characteristics*, 13 ANNUAL SURVEY OF INT'L & COMP. LAW 35, 37 (2007) (China has "downplayed the role of statutes [and] regulations" in favor of the "application of relatively few, generally drafted legal rules according to the policy needs of the political authority").

Nor is China's "socialist market economy" a market economy as understood in Western society. It

is one in which the "government is expected to monitor and control individual companies' market activities on a policy level, delegating and assigning the specifics of regulation downward." JA171. "Coordination" of the actions of companies in major industries is an important aspect of this control. "The purpose of coordination is to have domestic companies compete in the international market as a unity, to . . . advance China's collective interest." *Id.*

2. The governing agency controlling China's export trade is known today as the Ministry of Commerce (sometimes called MOFCOM). The Ministry's origins date back to 1949, when China established the Ministry of Trade. JA142. From 1993 to 2003, the Ministry was referred to as the Ministry of Foreign Trade and Economic Co-operation ("MOFTEC"). It was renamed MOFCOM in 2003 following a reorganization.

The Ministry is a component of the State Council (China's central government) and "the highest authority in China authorized to regulate foreign trade." Pet. App. 57a; JA141 & n.1. "It has the authority to draft and implement trade-related laws, regulations, policies and directives. [Its] interpretation of its own regulations and policies carries decisive weight under Chinese law." JA141-42; *see also* JA782-84.[1]

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[1] The suggestion by Petitioners (Pet. Br. 42) and *amici* Clarke and Howson (Br. 17-22) that the Ministry lacks authority to interpret Chinese law lacks any basis. China sent the U.S. State Department a diplomatic note that confirms the Ministry's authority. JA783 (referring to the Ministry's submissions as "a statement by a foreign government").

Since 1989, the Ministry has regulated the export of Vitamin C and other medicinal products through the Chamber of Commerce of Medicines and Health Products Importers & Exporters ("the Chamber"). CAJA685. The Chamber is called a "social organization," but that English translation of a Chinese term of art can be deceptive. It exercises delegated regulatory power and acts as an arm of the Ministry. *See* CAJA747, 3715-17; Pet. App. 72a-73a, 118a-19a n.37. At all relevant times, its function was to "coordinate import and export business in Chinese and Western medicines" by implementing government policies and regulations under "the guidance and supervision of the responsible departments under the Stat[e] Council." CAJA412 (Chamber statement, 2003). "Coordinating price, market and clients of foreign trade" were among these responsibilities. *Id.*

The Chamber is one of several chambers overseen by the Ministry. As the United States has explained, "China's Chambers of Commerce are organizations representing private members that also function as entities under MOFCOM's direct and active supervision and, accordingly, play a central role in regulating the trade of China's industries." First Written Submission of the United States of America, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394, WT/DS395, WT/DS398 ¶ 207 (June 1, 2010), *available at* goo.gl/sxyv43 ("US-WTO Submission").

3. In 1997, the Ministry instituted a regulatory system for the production and export of Vitamin C. In conjunction with the State Drug Administration, it issued the "1997 Notice," JA89-97, under which Vitamin C production was to be "strictly controlled." JA90. Under the Notice, the Chamber was to estab-

lish a "Vitamin C Coordination Group," later known as the Vitamin C Subcommittee. The Subcommittee was a branch of the Chamber, not a separate entity. JA80. Its main responsibilities were "to coordinate with respect to Vitamin C export market, price and customers." JA92. Its members were the four major Chinese Vitamin C manufacturers, Northeast Pharmaceutical Group Co., Ltd., Jiangsu Jiangshan Pharmaceutical Co. Ltd., Weisheng Pharmaceutical Co. Ltd., and Respondent Hebei Welcome Pharmaceutical Co., Ltd. ("Welcome"), JA422, and it was chaired by an officer of the Chamber, Mr. Qiao Haili. The four companies were all required to participate in the Subcommittee "and subject themselves to the coordination of the Group." JA92.[2]

The Subcommittee's 1997 charter conformed to the Ministry's directive. It explained that the Subcommittee was to "coordinate and administ[er] market, price, customer and operation order of Vitamin C export," and to "hold . . . working meetings for Vitamin C export to exchange information, summarize and communicate experience, analyze and work out coordinated prices for Vitamin C export, to supervise and inspect the implementation of such coordinated export prices [set] by the Sub-Committee." JA82-83. For violations, members were subject to "warning [and] open criticism" – a severe penalty in the Maoist

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[2] Respondent North China Pharmaceutical Group Corp. ("NCPG") is a state-owned holding company and the indirect parent corporation of Welcome. CAJA195. It consistently disputed the personal jurisdiction of the U.S. courts over it, as well as any liability for Welcome's Vitamin C activities. CAJA195-98. The court of appeals had no need to reach the issues specific to NCPG given its disposition of the case. Pet. App. 2a n.2.

system of governance[3] – and to the risk of cancelling their ability to export. JA85-86.

The Subcommittee was also responsible for the Chamber's "export administration." Specifically, it was required to "supervise the implementation of export license[s] by member enterprises and advis[e] on allocation and adjustment of [export] quota, and issuance of export license." JA82.

4. Beginning in 2002, the means of *enforcing* price coordination changed, but the requirement that the companies coordinate export prices through the Chamber and the Subcommittee did not.

In December 2001, anticipating the forthcoming changes, the Chamber convened a meeting of the four manufacturers. As directed by the Chamber, the companies agreed to export volume limitations and the Chamber made clear that "[t]he committed export volume as part of the industry self-discipline shall be strictly implemented," adding that companies "not in strict compliance with this requirement will be punished by the Vitamin C Sub-Committee." JA459.

"Self-discipline" is a "regulatory process that is well-understood and applied broadly in China." JA138. "That process, by design, involved communications among the relevant parties with a goal of seeking agreement on a unified course of action that would implement the mandatory goals of Chinese policy[.]" JA138-39, 174-78. *Accord* US-WTO Submis-

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[3] *See* Freeman Spogli Institute for International Studies, *Introduction to the Cultural Revolution*, SPICE DIGEST, Fall 2007, at 1 ("Mao favored open criticism and the involvement of the people to expose and punish the members of the ruling class who disagreed with him[.]"), *available at* goo.gl/dvpwYo.

sion ¶¶ 205, 216-17; Bruce M. Owen *et al.*, *China's Competition Policy Reforms: The Anti-Monopoly Law and Beyond*, 75 ANTITRUST L.J. 231, 248-49 (2008) ("[U]nder the practice of 'industrial self-discipline,' the major companies in an industry reach price agreements or other agreements to limit competition, in an effort to stabilize the market."); Wang Xiaoye, *The Prospect of Antimonopoly Legislation in China*, 1 WASH. U. GLOBAL STUD. L. REV. 201, 208 (2002) ("One always should view 'industrial self-discipline prices' as a synonym for government intervention in price competition among enterprises.").[4]

Soon after the December 2001 meeting, the Ministry superseded its 1997 Notice with a 2002 Notice issued jointly with the General Administration of Customs ("Customs"). JA98-101. It provided:

- The objective was "to adjust the catalogue of export products subject to price review by the customs for year 2002, in order to accommodate the new situations since China's entry into WTO, maintain the order of market competition, make active efforts to avoid anti-dumping sanctions . . . , promote industry self-discipline and facilitate the healthy development of exports." JA99.
- Vitamin C and 29 other products were now subject "to price review by the customs" under a "Price Verification and Chop ('PVC')" procedure. *Id.*

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[4] *Cf.* Container Owners Ass'n, *Chinese box manufacturers commit to waterborne coatings* (2016), *available at* https://goo.gl/hRP3tN (manufacturers agreed under industrial self-discipline to switch to more environment-friendly waterborne coatings).

- "[T]he relevant chambers must . . . submit . . . information on industry-wide negotiated prices for those export products subject to price review[.]" JA99-100.
- "The adoption of PVC procedure shall be convenient for exporters while it is conducive for the chambers to coordinate export price and industry self-discipline." JA100.

The 2002 Notice was followed by a "2003 Announcement" detailing the PVC procedure. JA102-06. The 2002 Notice had given the various chambers and Customs the ability to "suspend export price review for certain products" if the relevant subcommittee members approved. JA100. This provision, which was never invoked, was not continued in the 2003 Announcement. JA102-06.

The 2003 Announcement provided that: (i) the Chamber "shall be responsible for implementing" the PVC system; (ii) exporters were to specify in the contracts "the prices and quantities"; (iii) the Chamber was required to "verify the submissions . . . based on the industry agreements," "affix V&C chop to the conforming applications," and send them back to the companies for transmission to Customs. JA104-06.

In connection with the 2003 Announcement, the Chamber revised its Charter. JA53-78. It continued as "a national-wide and self-disciplined social entity voluntarily organized . . . with objectives of the trade coordination and service." JA53. "The objective of the Chamber of Commerce is to coordinate and guide the import and export of medicines and health products[.]" JA54. Its duties continued to include the obligation to "jointly maintain the order of the import and export [and to] coordinate the import and export prices, market and clients." JA55.

The Subcommittee also revised its charter and administrative rules. One change was that, in addition to the four major Vitamin C manufacturers – who were now referred to as "Council Members" and "Member Organizations"; JA197, 461 – the Subcommittee added 11 non-manufacturer export trading companies and smaller manufacturers as "member enterprises." JA462-63; CAJA2216-17. Their addition was consistent with the elimination of the discretionary (or "non-automatic") license requirement for exporters. *See* pp. 12, 16, 40 below.

The Subcommittee's coordination duties continued as before. The new Charter provided that the Subcommittee would continue to "coordinate and guide vitamin C import and export business activities, promote self-discipline in the industry," as well as to "maintain the normal order for vitamin C" exports, and to "protect the interests of the state, the industry and its members." JA183 (art. 8). It confirmed that: "The Subcommittee will discipline members [for] . . . [f]ailure to carry out industrial agreements[.]" JA467-68. Consistently, the Ministry's formal approval in 1997 of the Chamber's Vitamin C Subcommittee, JA79-80, including the obligation to "coordinat[e] the Vitamin C export market, price and customers of China," JA79, was never superseded and continued in full force and effect. JA420.[5]

The revised Charter also said that the Subcommittee was "a self-disciplinary industry organiza-

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[5] Petitioners' assertion that the 2002 Notice "abolished" the requirement to fix prices, Pet. Br. 8, is unsupported and inaccurate. The 2002 Notice unambiguously required companies to coordinate and arrive at industry-wide negotiated prices as part of industry self-discipline. JA99-100.

tion jointly established on a voluntary basis," JA182, and that members had a right "to freely resign." JA186. Council members, however, including the four leading manufacturers, were selected to four-year terms, JA190, 197, and there was no provision allowing a Council member to resign its post. Thus, as "a practical matter," none of the four major manufacturers could abandon participation. JA431. And none ever did.

Exporters who were not members of the Subcommittee were bound by the same PVC procedures. JA106 ("For V&C applications made by non-member exporters, the Chambers shall give them the same treatment as to member exporters."). Consequently, all exporters were required to adhere to the coordinated prices set by the Chamber's members.

Under the revised 2002 regime, as before, export prices were not set by the Ministry or the Chamber; they were largely "fixed by enterprises without government intervention." Pet. Br. 10. What China continued to require was that the companies themselves fix the prices under the supervision of the Chamber and its Subcommittee; the obligation was to reach "voluntary" agreements on prices through industrial self-discipline. JA139. The prices agreed on were up to the companies so long as they exceeded anti-dumping minima. JA175-77 ("Properly understood, what the government is compelling is the active participation of the industry in a mandated process which must be obeyed."); *see* JA105, 183.

The changes from the 1997 regime to the 2002 regime were modest. Non-manufacturing trading companies and smaller manufacturers could join the Subcommittee, and several did. Members were permitted to resign; but there is no evidence that any ev-

er did, and non-members were bound by the same requirements in any event. The major change was that export quota restrictions and non-automatic licensing were eliminated and replaced by the PVC system. JA167-68, 428-30; CAJA3898-99; *see also* CAJA2012. What did *not* change was the requirement to fix prices. The companies remained obligated under PVC to engage in industrial self-discipline, to accept the price coordination managed by the Chamber, and to report industry-wide negotiated prices under Chamber guidance. Price coordination through industrial self-discipline thus continued as before. *See* CAJA2154.

5. Price-fixing agreements are notoriously difficult to monitor and enforce, *see* George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44, 44-48 (1964), and that is especially so in a developing nation where the government had controlled all aspects of production until the recent past.

Still, PVC *was* enforced. The Chamber denied chops to nonconforming contracts, JA434-35, and directed production limitations to stabilize prices. JA435. In a few instances, manufacturers initially did not follow a requirement to curtail production, but they were later brought into compliance. JA180-81, 435-36. Contracts were inspected by the Chamber, which "refused to affix our chop to nonconforming contracts." JA436; *see* CAJA1767-68.[6]

6. China "acceded" to the World Trade Organization in 2001. In doing so, it "gave up export ad-

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[6] Petitioners assert that PVC was not "mandatory" because many of the contracts produced in discovery had no chop. Pet. Br. 11. But the process was for the companies to transmit the chopped contracts to Customs. JA105; Pet. App. 244a. No discovery was taken from Customs.

ministration" of Vitamin C. JA319. China did not give up the requirement of industry self-discipline, nor the companies' obligation to reach industry-wide price agreements under Chamber coordination. The "export administration" China abandoned, instead, was the regime of export quotas and non-automatic export licensing for Vitamin C that China had followed prior to 2002. *Id.*; JA90, 160, 162, 165, 428-29.

That is what the United States and the WTO themselves concluded. *See* US-WTO Submission ¶¶ 90-109. The WTO's trade reviews all determined that what China had given up in abandoning export administration was non-automatic licenses and exporter quotas, not price coordination by the Chambers. *See* WTO, *China Trade Policy Review 2006*, WT/TPR/S/161, at 104 ¶ 141 & n.120 (Feb. 28, 2006), *available at* goo.gl/H97MgH ("On 1 January 2002, China abolished export quotas and licences for . . . Vitamin C."); WTO, *Transitional Review Under Article 18 of the Protocol of Accession of the People's Republic of China*, G/C/W/438, at 2-3 ¶ 5(a) (Nov. 20, 2002), *available at* goo.gl/uu7k71. Contrary to the arguments of Petitioners and some of their *amici*, *e.g.*, Pet. Br. 9, 19, 53, China's representation to the WTO that it was giving up export administration of Vitamin C was thus entirely consistent with its continued requirement of price-fixing.

7. Subsequent WTO proceedings involving Raw Materials and a similar Chamber of Commerce confirmed that, throughout the class period, price-fixing of these materials, as well as Vitamin C, was required by China – a conclusion reached not only by China, but by the WTO, the United States, the European Union, and Mexico as well. *See* JA676-77, 722.

The upshot is that every independent entity that has analyzed the issues – other than the district court below – has concluded that China continued to mandate price-fixing for commodities subject to the PVC procedure throughout the class period in this case: the United States, the European Union, Mexico, the court of appeals below, and even another federal district judge in a different case.[7]

Plaintiffs themselves concede the continuation of mandated price-fixing under the 2002 regime. In the court below, Plaintiffs said that Chinese law "required the Chamber and its Subcommittee to 'actively coordinate to set vitamin C export prices and quantities.'" Brief for Plaintiffs-Appellees at 25.[8] And in this Court, Plaintiffs similarly acknowledge that: "On paper, 'verification and chop' required exporters to submit vitamin C export contracts to the Chamber, which was then supposed to affix a seal (or 'chop') if the contract met or exceeded an industry-determined minimum export price." Pet. Br. 8.

As the preceding discussion demonstrates – without even citing the Ministry's submissions – the regulations themselves make clear that Chinese law compelled price-fixing throughout the class period. The Ministry's submissions confirming that fact are discussed below.

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[7] *Animal Sci. Prods. v. China Nat'l Metals & Minerals Imp. & Exp. Corp.*, 702 F. Supp. 2d 320, 421-64 (D.N.J. 2010), *vacated & remanded on other issues*, 654 F.3d 462 (3d Cir. 2011). The district court in this case "disagree[d] with the approach taken in *Animal Science*." Pet. App. 105a.

[8] Petitioners have complained that this passage is taken out of context. Pet. Supp. Br. 10. It is not. The full context is appended as Annex A.

C. Proceedings Below

1. Petitioners' class action complaint was filed on January 26, 2005, in the Eastern District of New York, and subsequent cases were centralized there by the Judicial Panel on Multidistrict Litigation. The principal allegations were that Respondents had fixed the price of Vitamin C exports from China from December 2001 through June 30, 2006. JA13, 52.

Respondents moved to dismiss on the basis of sovereign compulsion, act of state, and international comity. JA19-20. The motion was supported by an *amicus* brief by the Ministry, Pet. App. 189a-223a, which, as the district court noted, was "unprecedented. [China] has never before come before the United States as amicus to present its views. This fact alone demonstrates the importance the Chinese government places on this case." *Id.* 168a. The *amicus* brief was accompanied by a sworn declaration with authenticated copies of the relevant legal materials with certified translations that provided the evidentiary basis for the legal statements in the brief. JA21.[9] That filing was followed by another official statement of the Ministry confirming the accuracy of the positions taken in the *amicus* brief. JA131-33.

The motion to dismiss was denied. The district court (Trager, J.) concluded that the Ministry was "entitled to substantial deference, but [its brief] will not be taken as conclusive evidence of compulsion, particularly where, as here, the plain language of the documentary evidence submitted by plaintiffs directly

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[9] The United States is therefore mistaken to claim that there had been no "sworn evidentiary proffer" in support of the Ministry's position. *See* U.S. Br. 24.

contradicts the Ministry's position." Pet. App. 181a. The Ministry had presented logical and consistent explanations of what the Chinese regulatory regime required – that the companies enter into voluntary agreements on price, subject to the coordination and supervision of the Chamber and its Subcommittee. *See* JA248-50; Pet. App. 205a-06a, 208a-09a. Nevertheless, the court concluded that the concepts of "self-regulation," "self-restraint," and "voluntary" participation rendered it unclear "from the record at this stage of the case whether defendants were performing a government function, whether they were acting as private citizens pursuant to governmental directives or whether they were acting as unrestrained private citizens." Pet. App. 185a.

2. In November 2009, Defendants moved for summary judgment, JA29, supported by a third formal submission from the Ministry. JA247-51.

The district court (Cogan, J.) denied the motion on the papers, without hearing oral argument from the parties or the Ministry. The court did not apply a "substantial deference" standard to China's submissions. *Cf.* Pet. Br. 3. Instead, the court simply "decline[d] to defer to the Chinese government's statements to the court regarding Chinese law." Pet. App. 56a, 118a-19a.[10] The court asserted that, "when the alleged compulsion is in the defendants' own self-interest, a more careful scrutiny of a foreign government's statement is warranted." *Id.* 121a. It said that the 2009 statement was "particularly undeserving of deference," *id.* 119a, and "suggest[ed] that the

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[10] The court made one exception, deferring to "the Ministry's explanation of the relationship between the Ministry and the Chamber." Pet. App. 118a.

Ministry's assertion of compulsion is a post hoc attempt to shield defendants' conduct from antitrust scrutiny." *Id.* 121a.

The court asserted that the positions taken by Respondents and the Ministry were inconsistent with China's representations to the WTO that it had given up "export administration" of Vitamin C. *Id.* 74a, 120a-21a, 123a, 136a. The court, however, never examined what "export administration" meant – ignoring that it meant *only* non-automatic licensing and export quotas, as the United States and the WTO had confirmed. *See* p. 12 above.

Bypassing the Ministry, the district court offered its own construction grounded in its own instincts rather than any identifiable principles of Chinese law. For example:

- Despite the explicit written requirement that exporters could not export unless they reported the "industry-wide negotiated prices" to the Chamber, the court concluded that "defendants had the power to effectively suspend verification and chop simply by not reaching any agreements in the first instance." *Id.* 125a.
- As to the provision in the 2002 Notice allowing *Customs and the Chambers* to suspend price review with the approval of the members, the court elected to "interpret [it] as granting *defendants* the *unilateral* authority to suspend verification and chop." *Id.* 123a-24a (emphasis added).
- "Although the 2003 Announcement does not contain a similar explicit suspension provision, I construe the 2003 Announcement as granting defendants the same power" to suspend PVC. *Id.* 124a-25a.

- The court concluded that the 2002 regime did not cover output restrictions even though "the term 'industry agreements' in the 2003 Procedures is broad enough to also include agreements on output restrictions." *Id.* 126a-27a.
- "[I]f all the members simply resigned from the Subcommittee . . . there would be no price or output restrictions that [non-members] would be required to follow." *Id.* 135a.

Notwithstanding its acknowledgement that, "to receive a chop under the 2002 PVC Notice and 2003 Announcement, an export contract was . . . required to comply with the industry-agreed minimum price," *id.* 126a, the district court concluded that compulsion was not proven because China did not dictate the specific prices to be set, and defendants' agreements on prices above a specified minimum went "beyond the scope of any potential compulsion." *Id.* 106a, 139a-42a. The court understood that Chinese law and custom are "something of a departure" from the constructs of Western society, *id.* 116a-17a, but proceeded to evaluate China's regulatory system by treating translated Chinese terms of art without regard to their meaning and usage in Chinese law. In particular, the court construed "industrial self-discipline" as implicating purely private, unilateral conduct, directly contrary to the term's actual meaning under Chinese law, custom, and practice. *Id.* 152a; *see also id.* 83a n.17, 120a n.39; JA138-39.

The court recognized that its rulings were inconsistent with the WTO proceedings in the Raw Materials matter, *id.* 136a-39a, and with the New Jersey district court decision in *Animal Science*, *id.* 105a-106a, but was undeterred.

3. Following class certification, trial was held from February 25, 2013 to March 14, 2013. Respondents' ability to defend themselves at trial was constrained. The Ministry's submissions and applicable Chinese regulations were excluded from evidence. Respondents proposed to have a former Ministry official, Qiao Haili, offer a detailed description of the Chinese regulatory regime in which the businesses operated (supported by copies of the regulations) and explain how the Ministry compelled the conduct at issue. JA411-39. Mr. Qiao proposed to testify to the creation of the Chamber and Sub-Committee, the history of Chinese Vitamin C regulation, how the Sub-Committee and Chamber operated under the guidance of the Ministry to effect Chinese policy goals, and how the system of "self-discipline" was a mandatory aspect of the Chinese regulatory regime. JA413-38. The district court, however, excluded much of this evidence, leaving only a shell of Mr. Qiao's proposed testimony. CAJA, at SPA178-88, 216-40.

Following settlements with the other defendants, the jury found Respondents liable for violating the Sherman Act. After post-trial motion practice, including an award of attorneys' fees and costs and offsets for settlement monies received, the judgment awarded the Damages Class monetary relief (including attorneys' fees and costs) of $147,831,471.03 plus post-judgment interest, and an injunction barring Respondents from coordinating prices for Vitamin C without regard for any potential contrary commands of the Chinese government. JA50-51.

4. Explaining that "China has attached great importance to this case," China submitted a formal protest of the district court's rulings in the form of a

diplomatic note to the U.S. Department of State. JA782-84.

5. The Court of Appeals for the Second Circuit vacated the judgment with instructions to dismiss the complaint. Pet. App. 1a-38a. In a unanimous opinion by Judge Hall (joined by Judges Cabranes and Wesley), the court held that the district court abused its discretion by denying deference to the Ministry's formal submissions, and by declining to abstain from exercising jurisdiction on international comity grounds. Citing *United States* v. *Pink*, 315 U.S. 203 (1942), the court ruled that "when a foreign government, acting through counsel or otherwise, directly participates in U.S. court proceedings by providing a sworn evidentiary proffer regarding the construction and effect of its laws and regulations, which is reasonable under the circumstances presented, a U.S. court is bound to defer to those statements." Pet. App. 11a, 25a.

The court of appeals applied the international comity balancing test developed by the circuit courts in *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 614-15 (9th Cir. 1976), and *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987). The court analyzed the Ministry's submissions and concluded that its reasonable explanation of the regulatory system, together with the record available at the motion to dismiss stage, established conclusively that it was impossible for Respondents to comply with both Chinese law and the Sherman Act. Pet. App. 27a-33a. The court also determined that the district court's construction of the system was "nonsensical" and erroneous in several respects apart

from the refusal to give any deference to the Ministry's submissions. *Id.*; *see* pp. 45-46 below. Having found a conflict between U.S. and Chinese law, the court concluded that the remaining comity abstention factors "decidedly weigh[ed] in favor of dismissal and counsel[ed] against exercising jurisdiction in this case," Pet. App. 34a, a point which Petitioners did not contest.[11] It thus vacated the judgment with instructions to dismiss. Rehearing was denied without recorded dissent.

6. Petitioners sought certiorari, and their petition was granted on January 12, 2018, limited to the question (no. 2) of the appropriate level of deference to be given to the Ministry's submissions.

SUMMARY OF ARGUMENT

1. The standard for deference unanimously adopted by the court of appeals is correct. The court analyzed the applicable Chinese regulatory provisions and concluded that China's formal interpretation was reasonable and worthy of deference. Its standard, which could be summarized as "defer if reasonable," is consistent with FED. R. CIV. P. 44.1, and with this Court's decision in *Pink*. This Court has invariably deferred to the formal statements of foreign governments about their own laws, and there is no reason to depart from that course here.

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[11] Petitioners argued only one aspect of the comity analysis before the court of appeals, *viz.*, whether there was a conflict between the Sherman Act and Chinese law. Petitioners did not argue that any of the other recognized comity factors weighed in their favor. Brief for Plaintiffs-Appellees at 45-46 (attached as Annex B).

The no deference (or effectively *negative* deference) approach deployed by the district court and advocated by Petitioners violates important international comity principles and risks excessively entangling the federal courts in matters of foreign affairs. The amorphous and ill-defined proposals by various *amici* supporting Petitioners do no better, for they would inject tremendous uncertainty into litigation over the meaning of foreign law and invite district courts to impose American-style legal analysis on foreign regimes whose cultural contexts and legal norms may differ radically from our own.

2. The Ministry's construction of its own regulatory system was accurate, and indeed is the only coherent interpretation of that regime. As the regulations specified, and as the Ministry explained, Vitamin C exporters were required by China to fix prices – to "coordinate" prices as a matter of "industry self-discipline" under the supervision of the Chamber. That view of China's regulatory regime was confirmed in related WTO proceedings involving Raw Materials. There, the United States, Europe, and Mexico, all agreed – relying on the Ministry's submissions *in this case* – that China required exporters "to export at set or coordinated export prices or otherwise face penalties." The WTO, also relying on the Ministry's submissions, concurred.

3. Petitioners' request to reinstate the district court's comity ruling has no merit. Wholly apart from the district court's erroneous and disrespectful deference standard, the court of appeals correctly rejected the district court's key rulings, concluding that the court's construction of China's regulatory system was "nonsensical."

4. Irrespective of the level of deference to the Ministry, the judgment should be affirmed. The only issue on comity abstention below was whether there was a true conflict between the requirements of Chinese law and the Sherman Act. The existence of conflict was established not just by the Ministry, but by the regulations themselves and their requirement that Vitamin C exporters coordinate their prices through industrial self-discipline.

China's requirement that competitors coordinate their prices compelled a *per se* violation of the Sherman Act in direct conflict with U.S. law. As conflict was the only comity issue contested below, this Court should affirm the judgment of the court of appeals.

ARGUMENT

I. THE SECOND CIRCUIT'S DEFERENCE STANDARD IS CORRECT AND CONSISTENT WITH RULE 44.1

A. The Second Circuit's limited holding is consistent with this Court's controlling precedent and Rule 44.1

1. The Second Circuit held that, when presented with the official statement of a foreign sovereign "regarding the construction and effect of its laws and regulations, which is reasonable under the circumstances presented, a U.S. court is bound to defer to those statements." Pet. App. 25a. This modest holding appropriately balances judicial independence against the principles of international comity, reflecting the respect owed to exercises of sovereignty by other nations. *See* JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 33, 37-38 (8th ed. 1883).

The Second Circuit found that the Ministry was the "highest authority within the Chinese Government authorized to regulate foreign trade," Pet. App. 6a; that the Ministry provided authenticated copies of its regulations, *id.* 8a & n.6; and that the Ministry's interpretation was reasonable, *id.* 27a-28a. As the court explained, the regulations themselves "demonstrate[d] that . . . Chinese law required Defendants to participate in the PVC regime in order to export vitamin C." *Id.* 27a. Petitioners' characterization of the decision below as applying "blind deference," turning on the "bare fact of the [foreign government's] appearance," *e.g.*, Pet. Br. 22-23, 26, 34, is untenable. The court analyzed and specifically endorsed the Ministry's key conclusions.

Petitioners never say precisely what standard of deference should be applied in this case. They do, however, rely on the district court's assertions that the Ministry's statements were a "post-hoc attempt to shield defendants' conduct," Pet. App. 121a, and a "carefully crafted and phrased litigation position," *id.* 120a. *See* Pet. Br. 18-19, 34-35, 54. Petitioners thus endorse a rule of negative deference, treating a foreign sovereign appearing before a U.S. court with suspicion rather than respect. Such a rule is antithetical to the respect that the courts of this nation owe to "the independence of every other sovereign state." *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

2. The court of appeals relied appropriately on *United States v. Pink*, 315 U.S. 203 (1942), in adopting its deference standard. *Pink* held that the "official declaration" of the Soviet Commissariat, which had the "power to interpret existing Russian law,"

was "conclusive" as to the meaning of a Russian expropriation decree. *Id.* at 220.

Pink cannot be distinguished from this case. First, the fact that the Commissariat's declaration was received through "diplomatic channels" was not significant in itself but rather because it proved the declaration's "authenticity and authority." *Id.* at 218, 221. The "authenticity and authority" of the Ministry's statements in this case has also been established, including through "diplomatic channels." The Ministry stated clearly that it was authorized to present the "official views of the People's Republic of China," JA131, and that authority was confirmed in China's diplomatic note to the State Department, JA782-84.

Second, the "conclusive" effect given to the Commissariat's declaration based solely on the Commissariat's "power to interpret existing Russian law," *Pink*, 315 U.S. at 220, cannot be squared with the Petitioners' claim, Pet. Br. 40, that other record evidence was somehow crucial to the decision. The Court did not cite any other evidence except for a passing observation that the "expert testimony tendered by the United States gave great credence" to its position on the Russian decree in a prior case. *Pink*, 315 U.S. at 218. Before the case reached this Court, however, the New York courts had found that the evidence established that the Russian decrees did *not* apply extraterritorially. *See Moscow Fire Ins. Co. v. Bank of N.Y. & Trust Co.*, 280 N.Y. 286, 309-11 (1939), *aff'd by an equally divided Court*, 309 U.S. 624 (1940). This Court declined to parse the evidence because Russia's contrary statement was "conclusive." (In this case, in any event, the record outside the Ministry's proffer confirms that the Ministry's explanation was correct. *See* pp. 4-11 above.)

3. This Court has never deviated from the clear rule of deference established in *Pink* more than 75 years ago. Petitioners identify no case where this Court has rejected (or even questioned) a foreign government's explanation of its own law, and research has identified none. This Court has consistently framed its holdings to accord with the explanations of foreign sovereigns, implicitly treating them as correct. *See Abbott v. Abbott*, 560 U.S. 1, 10-12, 14-15 (2010); *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 98-99 (2002); *Doe v. United States*, 487 U.S. 201, 218 n.16 (1988); *cf. Republic of Philippines v. Pimentel*, 553 U.S. 851, 866-67 (2008) ("[W]here sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign.").

The cases cited by Petitioners and their *amici* are not to the contrary. *First National City Bank v. Banco Para El Comercio Exterior de Cuba* (*Bancec*) involved the trial testimony of an attorney in Cuba's Foreign Trade Ministry, not an official statement by the Cuban government. 462 U.S. 611, 616 n.3 (1983). Regardless, the Court did not dispute the witness's testimony that Bancec had "independent legal status" under Cuban law, *id.*, but found that choice of law principles dictated that Cuban law should not apply to an expropriation claim not arising under Cuban law. *Id.* at 621-23. Similarly, in *Intel Corporation v. Advanced Micro Devices, Inc.*, the Court did not dispute the European Commission's description of its powers and role within the EU legal system. 542 U.S. 241, 254-55 (2004). The Court rejected only the Commission's view of the significance of those facts

under U.S. law, finding that based on its own description the Commission was a "tribunal" as the term is used in 28 U.S.C. § 1782. 542 U.S. at 258.

4. Both *Pink* and the decision below are consistent with FED. R. CIV. P. 44.1.

There is nothing in the text or history of Rule 44.1 that suggests it was intended to alter or overrule *Pink*. Nor is there any conceptual incompatibility between the general obligation of courts to determine foreign law under Rule 44.1 and rules that focus courts' discretion in doing so.

Rule 44.1 was designed to end unpredictable factual inquiries in favor of more orderly resolutions made as a matter of law. *See* FED. R. CIV. P. 44.1 advisory committee note. There is no incompatibility in saying that, within the determination of this question of law, all sources should be considered but the official submission of a foreign government should be followed if not unreasonable. In fact, fashioning clear rules for the weight afforded to specific types of sources is fully consistent with the fact that the Rule 44.1 inquiry is a determination of law reviewed *de novo* on appeal, not a factual determination involving weighing evidence and assessing credibility.

5. Each of the appellate cases cited by Petitioners is consistent with the Second Circuit's holding that conclusive deference is due only when a foreign government appears before a U.S. court and presents an official governmental explanation of its domestic law that is reasonable. *See United States v. McNab*, 331 F.3d 1228, 1233-35, 1240-42 (11th Cir. 2003) (district court properly deferred to initial Honduran government interpretation; court of appeals declined to overturn judgment based on new and inconsistent

Honduran interpretation received post-judgment); *McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101, 1108-09 (D.C. Cir. 2001) (crediting Iran's affidavits but observing that they described no binding requirement under Iranian law), *vacated*, 320 F.3d 280 (D.C. Cir. 2003); *Access Telecom, Inc. v. MCI Telecomms. Corp.*, 197 F.3d 694, 714 (5th Cir. 1999) (declining to defer to a Mexican agency circular where the Mexican government did not appear, and it was unclear whether circular applied given legal changes post-dating the circular).

6. The approach adopted by the Second Circuit is also eminently practical. As one commentator has observed:

> Holding that U.S. courts can second guess the highest administrative authority of a foreign state on interpretations of that state's law would raise serious practical problems. Most obviously, it would create difficulties for the regulated entities, who face the possibility of being told by a foreign regulator that they must do x and then being told by a U.S. court that the foreign regulator misunderstood its own domestic law and that they should not have done x.

Daniel A. Crane, *The Chinese Vitamins Case: Who Decides Chinese Law?*, COMPETITION POLICY INT'L, at 4 (March 2018), *available at* goo.gl/J9wKp8. The Second Circuit's rule thus helps avoid the inconsistent obligations that would likely arise if the federal courts routinely second-guessed foreign regulators' interpretations of their own laws.

B. International comity principles counsel a strong standard of deference for foreign sovereigns

1. International comity is the "recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). This recognition is not an "absolute obligation," but neither is it, as Petitioners suggest, a voluntary extension based on "mere courtesy and good will." *Id.*; *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985) (arbitration clause in international agreement enforceable due to "concerns of international comity . . . even assuming that a contrary result would be forthcoming in a domestic context").

International comity is not a "vague political concern favoring international cooperation when it is in our interest to do so"; it is also motivated by promoting "reciprocal tolerance and goodwill." *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court*, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part). Comity requires more than merely "prioritiz[ing] accuracy, reliability, and judicial independence." Pet. Br. 44. It requires also respect for the knowledge that foreign sovereigns have about their own laws. *See In re Oil Spill by the Amoco Cadiz Off the Coast of France*, 954 F.2d 1279, 1312 (7th Cir. 1992). It would be anomalous to respect a foreign government while disrespecting the formal representations it makes before U.S. courts. Accordingly, this Court has in other contexts granted

very substantial deference to the reasonable explanations of foreign sovereigns. *See Pimentel*, 553 U.S. at 866-67 (comity requires that U.S. defer to a nation's non-frivolous assertions of sovereign immunity); p. 25 above. There is no justification for withholding similar treatment for foreign sovereigns' explanations of the meaning of their own laws.

A strong deference rule in cases like this one thus "helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164-65 (2004); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 761 (2004) (Breyer, J., concurring in relevant part). Failing to credit a foreign sovereign's reasonable explanation of its own laws, particularly where that explanation reveals a true conflict of law, can be an "act of legal imperialism" that increases friction between nations, impairing the application of U.S. law and the promotion of U.S. interests. *Empagran*, 542 U.S. at 169; *see also Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007) (noting "presumption that United States law governs domestically but does not rule the world").

2. Petitioners misplace reliance on two regional treaties – to which the United States is not a signatory – that simply create a common, non-exclusive mechanism for sharing information. The treaties do not address the official statement of a foreign sovereign as to the meaning of its own laws; they instead focus on the treatment of information shared through treaty channels – information that may come from any number of sources, including private lawyers, experts, academics, judges, and other unspeci-

fied but non-binding avenues of finding foreign law.[12] And both treaties make clear that they merely establish a baseline that does not displace any other rules or standards that signatories may have implemented for considering questions of foreign law.[13]

There is no inconsistency in affording greater deference when a government asserts its sovereignty by making the affirmative decision to appear in a litigation to correct or forestall a misunderstanding of its laws than when responding less formally under treaties such as these. If the call of international comity on "each nation state . . . to 'respect the independence and dignity of every other'" is to have meaning, it must matter greatly when one sovereign appears in the courts of another to explain in official terms what its own laws require of its own subjects in its own territory. *Bolivarian Republic of Venez. v.*

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[12] *See, e.g.*, The European Convention on Information on Foreign Law, art. 8, June 7, 1968, 720 U.N.T.S. 154 (allowing states to delegate responsibility for replies to private bodies); Inter-American Convention on Proof of and Information on Foreign Law, art. 6, May 8, 1979, 1439 U.N.T.S. 111 ("Inter-American Convention") (the nation providing information "shall not be held responsible for the opinion expressed nor shall it be required to apply the law, or cause it to be applied, in accordance with the content of the reply provided"). The same is true of the Hague Conference proposal cited by Petitioners. *See Response of the United States of America to Feasibility Study on the Treatment of Foreign Law Questionnaire*, Preliminary Doc. No. 25 (Oct. 2007) at 14-15, *available at* goo.gl/SjC31Z (suggesting mechanisms such as a "panel of experts" and the use of "informal channels" for communications between the judiciary of different countries).

[13] Explanatory Report to the European Convention on Information on Foreign Law ¶ 4, E.T.S. No. 062 (1968), *available at* goo.gl/tWqn4m; Inter-American Convention, art. 8.

Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312, 1319-20 (2017) (quoting *Berizzi Bros. Co. v. S. S. Pesaro*, 271 U.S. 562, 575 (1926)).

3. Petitioners' comparison to treaty interpretation generally also fails. There are good reasons to grant a higher degree of deference in this case than the "great weight" that this Court has given to Executive Branch interpretations of treaties. *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982). First, treaties are bilateral agreements between sovereigns, and the parties to a treaty may disagree as to the interpretation of its provisions. This case concerns a sovereign's explanation of its unilaterally enacted legislation. Second, treaties are agreements to *cede* a degree of sovereignty in exchange for some benefit. Lawmaking is an *exercise* of sovereignty, and thus a foreign government may rightly expect a higher degree of deference when explaining the meaning of its laws.[14]

4. Petitioners' analogies to domestic contexts fail to capture the relevant international concerns.

As the United States points out, deference rules for U.S. administrative agencies do "not readily translate" to the present context. U.S. Br. 20. Petitioners nevertheless attempt to impose the framework of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), as the ceiling for deference to a foreign sovereign. Pet. Br. 48-

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[14] Petitioners wrongly suggest that the Second Circuit's holding requires courts to give greater deference to foreign agencies than to the U.S. Department of State as to the meaning of treaties. Pet. Br. 51 n.16. The decision below is limited to a foreign sovereign's explanations of its domestic law. Pet. App. 11a-12a, 34a.

55. *Chevron* deference, however, is based on respect for the division of powers among coordinate branches of the same government. By contrast, the deference afforded to a foreign government as a matter of international comity derives from respect for its independent sovereign authority. *Hilton*, 159 U.S. at 163-64; *see Access Telecom*, 197 F.3d at 714 (rejecting argument that *Chevron* directly bore on the question of deference to a foreign agency). If *Chevron* has any relevance here, it is because it would be anomalous to give less respect to a foreign sovereign's direct exercise of independent sovereignty than to an administrative agency's domestic exercise of delegated rulemaking authority. *Amoco Cadiz*, 954 F.2d at 1312 ("Giving the conclusions of a sovereign nation less respect than those of [a U.S.] administrative agency is unacceptable.").

Petitioners' comparison to deference rules for state governments fares no better. Petitioners are incorrect that this Court has held that the Constitution requires federal courts to give greater respect to state governments than to foreign sovereigns. The authority they cite, *Bond v. Hume*, concerns only "the relation of the several states *to each other*." 243 U.S. 15, 22 (1917) (emphasis added). In any case, Petitioners concede that constructions of state law made by the highest court of a state receive conclusive deference in U.S. federal courts. Pet. Br. 56; *accord* U.S. Br. 27 ("binding").

Deference rules for state governments provide no support for the no deference rule Petitioners urge here.[15]

C. Deference is particularly appropriate in this case because it implicates a conflict between sharply divergent economic and trade regimes properly reserved for resolution by the political branches

1. A high degree of deference to foreign sovereigns' reasonable explanations of their own laws is necessary to avoid interference with the international relations prerogatives of the political branches. This Court has held in many contexts that separation-of-powers concerns and recognition of the limits of the judiciary's institutional competence warrant great care to avoid negative foreign policy consequences. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 116 (2013); *see also Sosa*, 542 U.S. at 727 (recognition of new claims under the Alien Tort Statute); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (act of state doctrine); *McCulloch v. Sociedad*

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[15] The standard of deference advocated by the United States appears to be one of substantial deference, but the government adds a long list of factors that render its ultimate standard unclear. U.S. Br. 16-21. Such a vague standard would give district courts no guidance and would undermine Rule 44.1's objective of clarity and consistency. *Cf.* Benjamin G. Bradshaw, *et al.*, *International Comity in the Enforcement of U.S. Antitrust Law in the Wake of In re Vitamin C*, 31 ANTITRUST 87, 90 (Spring 2017) (praising "clarity" of Second Circuit's approach). The U.S. Chamber articulates a standard of "substantial deference." Provided that the foreign sovereign's construction of its own laws is "reasonable," Pet. App. 25a, or "not frivolous," *Pimentel*, 553 U.S. at 866-67, a substantial deference standard should require that construction to be followed – just as the court of appeals did here.

Nacional de Marineros de Honduras, 372 U.S. 10 (1963) (application of the National Labor Relations Act). The case for deference to the political branches concerning "delicate field[s] of international relations" is at its strongest where "the possibilities of international discord are . . . evident and retaliative action . . . certain." *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957).

The extraterritorial application of U.S. antitrust laws implicates "a foreign nation's ability independently to regulate its own commercial affairs," a sensitive aspect of international relations. *Empagran*, 542 U.S. at 165; *see also Timberlane*, 549 F.2d at 612. And, as this case demonstrates, the risk of international discord is particularly acute when U.S. antitrust law is applied to conduct required under foreign law. The district court's disrespectful treatment of and refusal to grant *any* deference to the Ministry triggered an immediate diplomatic response: the Chinese government formally protested its treatment in a diplomatic note to the U.S. Department of State that emphasized the "great importance" that China attaches to this case and to the degree of respect that its official statements receive in foreign courts. JA782-84. A Ministry spokesperson hinted at broader economic consequences as well, stating that the district court ruling would "cause problems for the international community and international enterprises" and predicting an "increase of international disputes" that "will eventually harm the interests of the United States." CAJA1666; *see also* CAJA1667-72, 1678-79. If the United States wants China to change its regulatory system for exports, that is a matter for diplomats, not a private class action.

2. Dissatisfaction with the manner in which China has chosen to regulate Vitamin C exports is not a basis for refusing deference. "[T]he courts of one country [should] not sit in judgment on the acts of the government of another, done within its own territory." *Underhill*, 168 U.S. at 252.

Refusing deference on that basis would also be short-sighted. In 1916, our Federal Trade Commission recommended that U.S. exporters be permitted to fix export prices in order to compete more effectively internationally. FED. TRADE COMM'N, REPORT ON COOPERATION IN AMERICAN EXPORT TRADE 8-9, 379-81 (1916), *available at* goo.gl/hMHbmG. Acting on that recommendation, Congress passed the Webb-Pomerene Act, 15 U.S.C. §§ 61-66, which authorizes (but does not require) registered U.S. associations engaged solely in export trade to fix export prices under an exemption from the antitrust laws. *See United States v. Minn. Mining & Mfg. Co.*, 92 F. Supp. 947, 965 (D. Mass. 1950). The United States has also chosen in a variety of contexts to authorize private firms to make industry-wide price and output decisions under government supervision.[16]

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[16] *See, e.g.*, *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2424 (2015) (describing program under which production "allocation is determined by the Raisin Administrative Committee, a Government entity composed largely of growers and others in the raisin business appointed by the Secretary of Agriculture"); Yuliva Bolotova, *Agricultural Supply Management and Antitrust in the United States System of Agribusiness*, 17 INT'L FOOD & AGRIBUSINESS MGMT. REV. 53, 61-65 (2014) (describing government-approved private output restriction programs for dairy and potatoes), *available at* goo.gl/ar3sHf. *See also* 2 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 1317-28 (8th ed. 2017) (agriculture); *id.* at 1521 (rate agreements among rail carriers), 1553 (ocean shipping).

That the United States has chosen similar substantive paths since early in the history of our antitrust laws – although quite different in their implementations – shows how China's approach is not inconsistent with our own historic precedents.

3. Deference is also important to ensure that the "the unnecessary irritant of a private antitrust action," *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 454 (2d Cir. 1987), does not create undue international friction. In the past, for example, many of our most important allies – including the United Kingdom, Canada, France, Germany, and Australia – have responded harshly to perceived excesses in enforcing U.S. antitrust laws extraterritorially. *See RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2106-07 (2016) (extraterritorial application of U.S. antitrust law has generated "considerable controversy") (quoting *Empagran*, 542 U.S. at 167).[17] These perceptions can make foreign governments less inclined to cooperate with U.S. efforts in cross-border enforcement or promoting "America's antitrust policies . . . in the international marketplace for such ideas." *Empagran*, 542 U.S. at 169; *cf. Daimler AG v. Bauman*, 134 S. Ct. 746, 763 (2014) ("The Solicitor General informs

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[17] *See, e.g.*, Joseph P. Griffin, *Possible Resolutions of International Disputes Over Enforcement of U.S. Antitrust Laws*, 18 STAN. J. INT'L L. 279, 279 (1982) ("In the past few years, foreign governments have reacted with increasing vehemence towards the enforcement of U.S. antitrust laws in a number of circumstances."); Deborah A. Sabalot, *Shortening the Long Arm of American Antitrust Jurisdiction: Extraterritoriality and the Foreign Blocking Statutes*, 28 LOY. L. REV. 213, 234-72 (1982) (describing foreign blocking statutes enacted in response to extraterritorial application of U.S. antitrust law).

us" that expansive views of U.S. jurisdiction have "impeded negotiations . . . on the reciprocal recognition and enforcement of judgments"). In today's circumstances, for example, the district court's disrespect of the Ministry cannot be helpful in U.S. efforts to gain more favorable treatment for U.S. intellectual property rights from Chinese authorities. *See generally* Prepared Statement of the Federal Trade Commission, *International Antitrust Enforcement: China and Beyond*, at 14, HOUSE SUBCOMM. ON REG. REFORM, COMMERCIAL AND ANTITRUST LAW (June 7, 2016), *available at* goo.gl/ES49NN.

Petitioners speculate that "opportunistic" foreign governments might appear in litigation, either *sua sponte* or at the behest of their nationals, to "shield" foreign defendants from the application of U.S. law by "miscontru[ing] their laws" in a way that appears reasonable but would be revealed as inaccurate under closer inspection.[18] Pet. Br. 36-38. But Petitioners cannot point to an instance where anything of the kind occurred; nor do they explain why the Second Circuit's requirement that any interpretation be supported and reasonable fails to protect against such a manipulation. China's requirement of price coordination through industrial self-discipline had been in effect for many years. Chinese companies, moreover, have frequently been the target of suits in U.S. courts, even before this case was filed,

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[18] Petitioners also suggest that foreign sovereigns could "engineer" results as plaintiffs in U.S. courts that they could not achieve in their own courts. Pet. Br. 38-39. Neither *Pink* nor the decision below addresses the deference due to a foreign sovereign when it voluntarily submits its own causes of action to the jurisdiction of a U.S. court, and that question is not before this Court.

but China did not appear in any of them.[19] China's appearances below instead underscore the significance that China attaches to this case and the seriousness of the district court's disrespectful treatment.

4. Deference is particularly important in cases such as this that involve a legal system that sharply diverges from our own, with concepts (such as "industry self-discipline" and "voluntary" participation) having no close counterparts in Western legal traditions. *See* JA139-42. The district court gave token recognition to the fact that Chinese law is "something of a departure from the concept of 'law' as we know it in this country," Pet. App. 116a, and that English translations of Chinese terms of art may not accurately capture their meaning in China. *Id.* 97a. These observations should have underscored the need for deference to the Ministry. *Id.* 29a. But instead, the district court undertook its own evaluation – essentially treating the Ministry's regulations as though they were the product of U.S. law and relying primarily on the court's own view of their post-translation "plain language." *Id.* 97a, 116a-17a. *Cf. Abbott*, 560 U.S. at 20 ("Judges must strive always to avoid a common tendency to prefer their own society and culture, a tendency that ought not interfere with objective con-

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[19] *See, e.g., Trans Chem. Ltd. v. China Nat'l Mach. Import & Export Corp.*, 332 F.3d 815 (5th Cir. 2003); *Lehman Bros. Commercial Corp. v. Minmetals Int'l Non-Ferrous Metals Trading Co.*, 179 F. Supp. 2d 159 (S.D.N.Y. 2001); *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558 (Fed. Cir. 1994); *United States v. Yi Hai Lin*, 5 F.3d 544 (9th Cir. 1993); *Miller & Co. v. China Nat'l Minerals Import & Export Corp.*, No. 91 C 2460, 1991 WL 171268 (N.D. Ill. Aug. 27, 1991); *Advance Int'l, Inc. v. China Nat'l Arts & Crafts Import & Export Corp.*, No. 90 CIV. 2070 (MBM), 1990 WL 106825 (S.D.N.Y. July 26, 1990).

sideration[.]"); *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 499 (1941). Unsurprisingly, that process yielded incoherent and erroneous conclusions.

II. THE MINISTRY'S CONSTRUCTION OF CHINESE LAW WAS CORRECT

A. China's construction of its regulatory system was logical and coherent

The Ministry's amicus brief on the motion to dismiss, Pet. App. 189a-223a, supplemented by its later submissions, JA127-33, 247-51, provided a common sense and coherent interpretation of the regulatory regime China had imposed. As the court of appeals said, the Ministry "reasonabl[y] explain[ed]"

> the government's expectation that private actors actively self-regulate to achieve the government's policy goals in order to minimize the need for the government to resort to stronger enforcement methods. In this context, we find it reasonable to view the entire PVC regime as a decentralized means by which the Ministry, through the Chamber, regulated the export of vitamin C by deferring to the manufacturers and adopting their agreed upon price as the minimum export price. In short, by directing vitamin C manufacturers to coordinate export prices and quantities and adopting those standards into the regulatory regime, the Chinese Government required Defendants to violate the Sherman Act.

Pet. App. 28a. The contrary interpretation urged by Petitioners and the district court, in contrast, was "nonsensical," as it described a system that would collapse before it even began. *Id.* 27a-28a.

B. China's representations to the WTO are entirely consistent with its position in this case

1. A crucial error that has infected this case from the outset is the idea that China's representations to the WTO were inconsistent with its arguments in this case – that giving up "export administration" meant giving up industrial self-discipline and price coordination. That error was critical to the district court's decision, Pet. App. 74a, 120a-21a, and has been unfortunately repeated here by some of Petitioners' *amici*. *See, e.g.*, AAI Br. 16. By asserting that China was speaking out of both sides of its mouth, Petitioners have tried to bring this case within the rule suggested by *McNab*, 331 F.3d at 1233-35, that deference is not owed when the foreign sovereign's statements are inconsistent.

There is not and has never been any inconsistency. China never said that it had given up industrial self-discipline and price coordination when it entered the WTO. *See* p. 12 above. What it gave up was the requirement that exporters of Vitamin C be subject to discretionary licensing or company-specific export quotas. JA90, 160, 162, 165, 319, 428-29. Nothing in the WTO's trade reviews and nothing in the later submissions by the United States (or the other complainants) indicated that China had agreed to abandon industrial self-discipline or price and quantity coordination.

2. This made-up inconsistency is the only inconsistency offered by Petitioners or any of the *amici*. Because there was in fact no inconsistency at all, the arguments that the Ministry is not entitled to deference on that basis necessarily fail.

C. The WTO Raw Materials proceedings confirm the appropriateness of deference to the Ministry in this case

1. The WTO "Raw Materials" proceedings confirmed both that the requirement to fix prices continued throughout the class period, and that deference to the Ministry was appropriate.

The proceedings related to bauxite, phosphorus, and other similar materials. These products were under the auspices of a different chamber of the Ministry, the Chamber of Commerce of Metals Minerals & Chemicals Importers & Exporters ("CCCMC").

That Chamber had a variety of responsibilities, including the promotion of industry self-discipline and coordinating prices among the members. JA685-91. In those respects, its operations were identical to those of the Chamber at issue here. *See* US-WTO Submission ¶ 208.

At the WTO, the United States, Europe, and Mexico – as complainants – explained "that China coordinates export prices for the products at issue through a 'system of self-discipline' based on informal statements and oral agreements between traders and export regulators and where the CCCMC directs commodity-specific branches or coordination groups." JA676.

The only disagreement on this issue was whether, as China argued, price-fixing was only

mandated through 2008, when the PVC system ended, or whether it continued into 2010. JA677-79.[20] The WTO Panel sided with the complainants, concluding that "China require[d] exporting enterprises to export at set or coordinated export prices or otherwise face penalties" through 2010. JA722.[21]

The submission of the United States focused on how the CCCMC effectively mandated the price-fixing regime. As the United States explained, "China's Chambers of Commerce . . . play a central role in regulating the trade of China's industries." *See* US-WTO Submission ¶ 207. It identified "the coordination of export prices" as one of "the key areas in which the CCCMC coordinates export activities," adding that "the industry coordinated export price is considered 'a collective contract' that industry members must abide by." *Id.* ¶¶ 210, 217. The United States also explained how the PVC system mandated price-fixing:

> The PVC procedure requires exporters of yellow phosphorus to submit their export contracts to the CCCMC for "verification." The CCCMC is required to examine the export

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[20] Throughout the WTO proceedings, price-fixing was never disputed. One issue was whether the compulsion of price-fixing violated China's obligations under Art. XI:1 of the General Agreement on Tariffs and Trade ("GATT"). China argued that it did not, but the WTO Panel concluded otherwise. JA722-24.

[21] The Panel's factual findings were upheld by the WTO's appellate body, but the conclusions as to whether the price-fixing and some other measures violated GATT were vacated because of the lack of specificity in the complainants' original complaints. Reports of the Appellate Body, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394, WT/DS395, WT/DS398 (Jan. 30, 2012), *available at* goo.gl/ZvH6AK.

> contracts and verify that the contracts comply with relevant regulations and industry coordination, including the industry coordinated export price. Where the CCCMC verifies the elements of a particular export contract, in particular the export price, are in compliance, it must affix its PVC chop (*i.e.*, its seal or stamp) to a special PVC form and to the export contract where the prices and quantities are indicated. The CCCMC must return the contract to the exporter within three days. Once the exporter receives the verified export contract bearing the CCCMC's PVC chop, it must declare the contract to Customs for clearance. Customs is required to deny clearance for any export contracts that do not bear the CCCMC's PVC chop.[22]

Id.¶ 224. The other complainant submissions were to the same effect. *E.g.*, First Written Submission by the European Union, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394, WT/DS395, WT/DS398 ¶¶ 356-57, 360-68 (June 1, 2010) ("EU-WTO Submission"), *available at* goo.gl/uYjFhX; JA676.

2. In this Court, the United States seeks to limit the weight of its own successful argument before the WTO. U.S. Br. 31 n.7. It argues that the "proceedings involved a different record and other

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[22] The WTO Panel endorsed the position taken by complainants but declined to address the PVC regulations on the basis that they were "outside the Panel's terms of reference" because not specified in the original complaints. JA726. The Panel based its ruling on the broad requirement to "set or coordinat[e] export prices or otherwise face penalties." JA722-24.

commodities," and that the legal standard only required proof that the price-fixing be "attributable to" China, rather than "required." *Id.* Both statements are true. Neither makes a difference.

In every relevant respect, regulation by the CCCMC was identical to regulation by the Chamber here. The CCCMC's job was to oversee mandatory price and output coordination by its members and to administer the PVC system for yellow phosphorous, functions identical to the Chamber's in this case. *See* US-WTO Submission ¶¶ 208-09. The United States identifies no material differences. Nor can it; its arguments were based largely on the Ministry's submissions about Vitamin C *in this case. Id.*

As for the "attributable to" standard, the government ignores the fact that it argued (and the WTO and other complainants agreed) that price-fixing was "attributable to China" *because it was required by China.* US-WTO Submission ¶¶ 207, 210, 217, 224. As the WTO found, "China *requires* exporting enterprises to export at set or coordinated export prices or otherwise face penalties[.]" JA722 (emphasis added).

3. At the WTO, the United States, the European Union, Mexico, and the WTO itself all relied extensively on the Ministry's amicus brief in the district court in this case. *See* US-WTO Submission ¶¶ 207-08 & *passim*; EU-WTO Submission ¶¶ 171-72 & *passim*; JA680-82, 728. In related proceedings, the District of New Jersey did so as well. *Animal Sci.*, 702 F. Supp. 2d at 426-29. No one described the Ministry's positions as self-serving, inconsistent with China's representations to the WTO about giving up export administration, or in any way biased or inaccurate. All relied on the Ministry's accurate description of China's regulatory system.

Having relied on the Ministry's explanation to advance its position at the WTO, it is unseemly for the United States now to suggest that the very same Ministry statements could be unreliable.

III. THE DISTRICT COURT ERRED IN APPROACH AND OUTCOME

1. By asserting that, where compulsion is in the defendants' self-interest, "more careful scrutiny of a foreign government's statement is warranted," and that the Ministry's statements were "a post-hoc attempt to shield defendants' conduct from antitrust scrutiny," Pet. App. 121a, the district court effectively applied a standard of negative deference. Foreign governments rarely appear in U.S. cases, and, when they do, it is almost invariably to support the interests of their nationals. *See Empagran*, 542 U.S. at 167-68. To decline deference on that basis is to afford no deference at all.

2. Point IV in Petitioners' brief seeks to have this Court reinstate the district judge's rejection of Respondents' comity defense. Pet. Br. 57-59. They argue that footnote 10 of the Second Circuit's opinion, which they quote five separate times, reflects a determination by that court that, but for the deference standard, the district court's comity ruling was correct. Pet. Br. 3, 23, 34, 58, 59. Footnote 10 does not bear the weight Petitioners put on it and, even if it did, there would be no basis to uphold the district court's ruling.

Approving the "careful and thorough treatment of the evidence before it" is an approval of the district court's *process* (had China not appeared), not an approval of its outcome. Pet. App. 30a n.10. In fact, the court of appeals made clear that, separate from the

standard of deference, the district court's construction of the regulatory program made no sense. *Id.* 27a-28a ("It would be nonsensical to incorporate into a government policy the concept of an 'industry-wide negotiated' price and require vitamin C manufacturers to comply with that minimum price point if there were no directive to agree upon such a price."). The court added that the district court had erred in several other respects as well:

> First, it determined that whether Chinese law compelled Defendants' anticompetitive conduct depended in part on whether Defendants petitioned the Chinese Government to approve and sanction such conduct. Second, it relied on evidence that China's price-fixing laws were not enforced to conclude that China's price-fixing laws did not exist. And third, it determined that if Chinese law did not compel the exact anticompetitive conduct alleged in the complaint, then there was no true conflict.

Id. 30a. The Second Circuit's disapproval of these errors, wholly apart from the standard of negative deference the district court employed, negate any argument that the Second Circuit intended to endorse the district court's analysis.

3. The district court's disrespectful approach should be rejected in any event.

As discussed above (pp. 38-39), the district court acknowledged that "the Chinese law and regulatory regime that defendants rely on is something of a departure from the concept of 'law' as we know it in this country — that is, a published series of specific conduct-dictating prohibitions or compulsions with an

identified sanctions system." Pet. App. 116a. Nevertheless, the court proceeded to reach conclusions inconsistent with the counsel of those in the best position to provide direction, the Ministry and the experts.[23] Contrary to the positions taken by *amici* AAI and Clarke and Howson, the difficulty of construing complex foreign regulations counsels greater, not less, reliance on the submissions of the relevant governments – the people responsible for administering the regulations – when available. *See* Stephen Breyer, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES 92 (2015). The district court's faulty analysis in this case provides an excellent example.

The district court's construction of the regulatory provisions in issue rendered them incoherent. As discussed above, under the court's construction:

- The companies were obligated to report "industry-wide negotiated prices" but "defendants had the power to effectively suspend verification and chop simply by not reaching any agreements in the first instance." Pet. App. 125a-26a.
- The 2002 suspension provision authorized the Chamber and Customs to suspend PVC, but the court found defendants had the "*unilateral*

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[23] As the court noted on summary judgment, "Plaintiffs do not have a Chinese law expert[.]" Pet. App. 59a n.5. (Petitioners offered a declaration from an American professor criticizing the weight of certain documents at the motion to dismiss stage, JA119-26, but did not offer any expert testimony on what Chinese law required at any stage.) Respondents presented expert testimony from Professor Shen Sibao and Professor James B. Speta. JA134-79; CAJA370-406. Their testimony was unrebutted.

authority to suspend verification and chop," *id.* 124a (emphasis added), rendering the Chamber's regulatory regime a nullity. The court also concluded that the suspension provision continued in 2003 despite nothing in any document or testimony to that effect. *Id.* 124a-25a.

- "[I]f all the members simply resigned from the Subcommittee. . . . there would be no price or output restrictions that [non-members] would be required to follow." *Id.* 135a.

Just as the court of appeals determined, *id.* 27a-28a, under the district court's construction, the entire regime supervised by the Ministry and the Chamber was unworkable and made no sense.

In contrast, the interpretation provided by the Ministry made perfect sense: Vitamin C exports were subject to a system under which the exporters were required to reach voluntary "industry-wide agreements" on price, without government involvement in determining the specific prices, and then submit the prices to the Chamber and Customs for verification in order to receive the "chop" required to export. The Chinese system may (and certainly does) vary from how Western nations would approach the issues, but the system is coherent, internally consistent, and achieves China's policy goals. All this is clear from reading the applicable regulations themselves – but was also carefully explained to just this effect by the Ministry. *Id.* 189a-223a; JA127-33, 247-51.

The district court asserted repeatedly that a number of the terms in the regulatory materials and the company documents were susceptible of differing interpretations. *See, e.g.*, Pet. App. 120a (penalties under self-discipline), 124a (suspension provision), 126a-27a (applicability of PVC to output restrictions),

128a (requirement to specify prices and quantities to receive a chop). But rather than rely on the sources who would know, *i.e.*, the Ministry (or the experts or the commentators), to address these perceived ambiguities, and rather than interpret the regulatory system as one that was workable and made sense, the court simply reached outcomes in every instance favorable to the Petitioners and adverse to China and the Respondents.

By bypassing the Ministry, the district court found itself making up its own interpretation of critical Chinese terms that have no counterpart in American law. One key example is "industry self-discipline." The court's determination that industry self-discipline reflected an absence of government compulsion was contrary to any plausible reading of the plain language of the regulatory provisions, and to the unanimous views of the Ministry, the expert testimony, and independent commentators that self-discipline is a government mandate for industry members to go out and reach "voluntary" agreements on prices and volumes. *Compare* Pet. App. 79a-80a *with* pp. 6-7 above.

The district court's stated reason for rejecting nearly everything the Ministry had to say was that the Ministry statements did not cite every regulation and did not anticipate the court's questions and criticisms. Pet. App. 119a-22a. But as the advisory committee note to Rule 44.1 provides, "[o]rdinarily the court should inform the parties of material it has found diverging substantially from the material which they have presented; and in general the court should give the parties an opportunity to analyze and counter new points upon which it proposes to rely." FED. R. CIV. P. 44.1 advisory committee note; *see*

Charles E. Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1296 (1952). The district court expressly declined to follow that procedure here, giving neither Respondents nor the Ministry the opportunity to address the court's concerns. Pet. App. 97a & n.24. It did not even hold oral argument on summary judgment.

Notwithstanding its rejection of the Ministry, the district court cited no provision of Chinese law supporting its manner of construing the regulations in issue. Its ruling even defied basic U.S. canons of construction – that regulations should not be interpreted in a manner that defies the plain meaning of the terms, that makes no sense, that would defeat the purpose of the regulations, or that fails to give effect to all of the regulations' terms. *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 476–77 (2003) ("[W]e should not construe the statute in a manner that is strained and, at the same time, would render a statutory term superfluous."); *United States ex rel. Eisenstein v. City of N.Y.*, 556 U.S. 928, 933 (2009) ("[S]tatutes [should] be construed in a manner that gives effect to all of their provisions.").

The district court's analysis has nothing to commend it, and this Court should reject it.

IV. REGARDLESS OF THE LEVEL OF DEFERENCE, THE JUDGMENT SHOULD BE AFFIRMED

1. In the end, the level of deference should make no difference. The Second Circuit's standard is not one of conclusive deference in all circumstances, and its standard is entirely proper. But even if the standard were one of no deference, as if the Ministry had not even appeared, there is only one appropriate

outcome: dismissal of the complaints on the basis of international comity.[24]

A judgment of affirmance is therefore in order even if the Second Circuit's standard is modified in some way. This question of the proper disposition here has been argued by Petitioners (Pet. Br. 57-59) and by a few of Petitioners' *amici* (*e.g.*, AAI Br. 12-16). Addressing that question is consistent with the Court's opinions in a number of related contexts, where it disagreed with the standard applied below but affirmed after applying the correct standard. *See Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 765-68 (1984); *Kiobel*, 569 U.S. at 108; *Knight v. Comm'r of Internal Revenue*, 552 U.S. 181 (2008); *United States v. Tinklenberg*, 563 U.S. 647 (2011).

2. In considering whether to dismiss on the basis of international comity, the sole issue presented to the court of appeals was whether Chinese law was in conflict with the Sherman Act. *Cf. Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798-99 (1993). The court found that the other factors "decidedly weigh in favor of dismissal," Pet. App. 34a, and Petitioners never contested the point. Annex B.

Petitioners and AAI advance three arguments as to why the conduct in issue here was not compelled and, therefore, that there was no conflict between Chinese and U.S. law. None has merit.

i. The first argument is that, because participation in the subcommittee was "voluntary" and could be terminated, there could be no compulsion.

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[24] Comity is the only one of Respondents' defenses before this Court. The court of appeals had no need to reach any of the other issues raised by Respondents on appeal. Pet. App. 37a-38a.

Pet. Br. 8-12; AAI Br. 11-15. There is nothing, however, to indicate that participation by the four leading manufacturers – as distinguished from the newly-added members – was voluntary in any meaningful sense. The four were all Council members appointed for four year terms with no provision for termination, and the only evidence in the record was that they could not withdraw as a practical matter. *See* pp. 9-10 above.

Even so, the idea that everyone could refuse to join, resign, or decline to reach agreements in the first instance fails as well. That argument would render the entire regulatory regime a nullity. The plain language of the regulations required submission of "industry-wide negotiated prices," JA99, a requirement that would make no sense absent the requirement to arrive at an industry-wide negotiated price. Pet. App. 28a. And non-members were bound to the industry-wide negotiated prices even if they did not participate. JA105-06.

The ability to withdraw makes no difference in any event. Just as the ability to withdraw is no defense in an action for price-fixing, *e.g.*, *United States v. Salmonese*, 352 F.3d 608, 615 (2d Cir. 2003); *United States v. Hayter Oil Co.*, 51 F.3d 1265, 1271 (6th Cir. 1995), that ability cannot negate the fact that China required a violation of the Sherman Act. And, to repeat, withdrawing members were still bound by the Chamber's coordinated prices anyway. JA106.

Petitioners effectively concede that the 1997 regulatory regime compelled the companies to fix prices and limit output. *See, e.g.*, Pet. Br. 5-6, 8. But they identify nothing in the 2002-03 notices, announcements, charters, or anything else that changed the obligation to coordinate price and output, under

the Chamber's supervision, in furtherance of industrial self-discipline. Those obligations – and thus the compelled violation of the Sherman Act – continued in full force. JA53-55, 99-100, 105-06, 183.

ii. Petitioners and AAI assert that Respondents exceeded the "scope" of governmental compulsion by agreeing on prices higher than antidumping minima, and by agreeing on output limitations, not just price. Pet. Br. 58 n.19; AAI Br. 12-13.

As to the scope of the compulsion, the governmental directive was for the companies to reach agreements on prices voluntarily, without having the government set a particular price. *See* pp. 7-11 above. The obligation was to agree on prices by themselves, *see* JA55, not to charge some dictated price. Respondents acted entirely within the scope of that compulsion, and that was what was in conflict with the Sherman Act. It has long been bedrock that "conspiracies under the Sherman Act are not dependent on any overt act other than the act of conspiring," *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940), that "[a]ny combination which tampers with price structures is engaged in an unlawful activity," *id.* at 221, and that the price level established does not matter, *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927); *see Plymouth Dealers' Ass'n v. United States*, 279 F.2d 128, 132 (9th Cir. 1960) ("agreed starting point" for price negotiations sufficient to establish violation). Petitioners and AAI ignore these principles.

The output argument, Pet. Br. 11-12, fails as well. Coordination on output was required under the 2002 PVC regime. The companies were obligated to specify to the Chamber "the prices and quantities" and the Chamber was required to "verify the submis-

sions by the exporters based on the industry agreements." JA105; *see* JA59; CAJA2216-17. Moreover, as this Court has often explained, price and output are economically (and legally) the same. *See Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 777 (1999) ("An agreement on output also equates to a price-fixing agreement.") (quoting *General Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 594-95 (7th Cir. 1984)); *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 233 (1993) ("Supracompetitive pricing entails a restriction in output."). Compelling price-fixing is compelling agreements on output. Although the Chinese regulations spoke primarily about price, their scope encompassed output (as they would have to), and the Chamber supervised production quantities throughout the relevant period. *See* JA180, 242, 367, 435. Requiring companies to fix prices without regard to output would have made no sense.

iii. Petitioners also note the difficulties the Chamber sometimes had in enforcing the agreements, and the occasional cheating. Pet. Br. 10-11.

Less-than-complete enforcement and cheating have nothing to do with whether Chinese law required the price-fixing Petitioners challenge. *Socony* confirmed that the violation is the agreement, not its success, and the courts have consistently held that cheating is not a defense to a price-fixing charge. *See United States v. Andreas*, 216 F.3d 645, 679 (7th Cir. 2000) ("[C]artel members cheated each other when they could[.]"); *Hayter*, 51 F.3d at 1274-75; *accord* Pet. App. 32a ("[I]nquiring into whether the Chinese Government actually enforced the PVC regime as applied to vitamin C exports confuses the question of what Chinese law required with whether the vitamin

C regulations were enforced."). Just as cheating cannot negate the existence of an agreement to fix prices, it equally cannot change what Chinese law required.

The Chamber did its best to enforce the requirement to coordinate price and output. JA434-36. It is not surprising, however, that enforcement proved to be difficult. China was moving from a command economy to one in which more private ownership was permitted, and companies were experiencing competition under regulation for the first time. "Cheating" on price-fixing arrangements is prevalent and often economically rational even in the most mature economies. *See* 2B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 405b (4th ed. 2014). That it was observed in China's nascent "socialist market economy" is neither surprising nor a basis for denying the compulsory nature of China's regulatory regime.

3. The internal company documents cited by Petitioners do not change the outcome. Complaints about company noncompliance with output reductions, statements occurring in unrelated contexts such as "only honest fellows will follow," Pet. Br. 12-14,[25] and the suggestion that defendants need to act "in a more hidden way" following the initiation of this lawsuit, *id.* 16, have nothing to do with what Chinese law in fact required. Disputes about rival compliance

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[25] The relevant passage describes general complaints about "illegal or sub-standard drug producers" whose products raised safety concerns. It is not about price coordination and is not specific to Vitamin C. JA454, 603. It was about getting the Chamber greater authority to "punish companies who engage in smuggling, tax evasion or who have little credibility" and to "honor those who are trustworthy" to improve the "credibility" of Chinese pharmaceutical products. JA455.

with price-fixing agreements, and the nervous reactions of Chinese nationals sued for vast sums under unfamiliar laws in a country 6800 miles away are not surprising. Much less do they suggest that price-fixing was not required under Chinese law.

4. In this Court, in addressing comity abstention, the government criticizes the court of appeals for giving "inadequate weight to the interests of the U.S. victims . . . and to the interests of the United States in enforcement of its laws." U.S. Br. 32 n.8. As Petitioners raised no such arguments below, it seems unfair to criticize the Second Circuit for not addressing them. But even if the points had been raised, they would not properly have affected the outcome.

Plaintiffs' interests in collecting money and the U.S. national interest in enforcing the antitrust laws are present in every private antitrust case. There is nothing unique about those interests here. In contrast, the other relevant considerations are unique: defendants were all Chinese companies; all the activity took place in China under China's regulatory regime; China has repeatedly explained the importance of this case, and has protested the district court's disposition through official diplomatic channels. The considerations favoring dismissal, therefore, are at their zenith. To argue that they are overcome by the typical interests at issue in every case, whether domestic or international, is to argue comity dismissals are never appropriate. This Court has never said any such thing, and specifically declined certiorari to address that argument when agreeing to hear this case. *See* Pet. i; *cf. Hartford Fire*, 509 U.S. at 812-22 (Scalia, J., dissenting in relevant part, joined by O'Connor,

Kennedy, and Thomas, JJ.) (endorsing principle of comity abstention which majority declined to reach).

As the case now stands, the only issue on comity abstention is whether Chinese law conflicted with the Sherman Act. *See id.* at 798 (whether there is a "true conflict" is the "only substantial question in this litigation"). The court of appeals correctly concluded that it did. *See* Michael N. Sohn & Jesse Solomon, *Lingering Questions on Foreign Sovereignty and Separation of Powers After the Vitamin C Price-Fixing Verdict*, 28 ANTITRUST 78 (Fall 2013).

5. As the court of appeals recognized, Petitioners' arguments amount to an attack on China's choice of regulatory system and the manner in which it was implemented and enforced. Pet. App. 31a-32a. The requirement to fix prices was stated unambiguously in the regulatory documents, as was the structure of the PVC enforcement mechanism. By questioning the level of enforcement by Chinese officials, and demanding that they do more than they did, Petitioners impermissibly seek to invalidate "the effect of official action by a foreign sovereign." *W.S. Kirkpatrick & Co. v. Envt'l Tectonics Corp.*, 493 U.S. 400, 406 (1990). Courts of the United States do not tell foreign nations how to enforce their own laws, *Underhill*, 168 U.S. at 252-54, and a private class action case is not a proper vehicle for invalidating China's method of regulating the export of Vitamin C.

As Circuit Judge Ginsburg and John Taladay put it recently, if antitrust enforcers

> do not apply comity in the application of their laws and in limiting the extraterritorial scope of their remedies, then international competition enforcement will quickly devolve into a

> "race to the bottom," in which the country with the most restrictive competition laws will regulate commercial conduct for the entire world. The effects doctrine is a legitimate basis upon which to apply competition laws and impose remedies but, just as an agency considers how foreign conduct affects its domestic consumers, it likewise should ensure that its remedy does not unnecessarily affect foreign governments, agencies, business interests, or consumers. Comity should be invoked to prevent the effects doctrine from becoming a way for one jurisdiction to impose its domestic commercial policy on the conduct of businesses outside its borders. Otherwise competition enforcement turns from a policy to protect consumers into a slightly disguised way of implementing industrial policy.

Douglas H. Ginsburg & John M. Taladay, *Comity's Enduring Vitality in a Globalized World*, 24 GEO. MASON L. REV. 1029, 1048-49 (2018) (forthcoming).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

JONATHAN M. JACOBSON
Counsel of Record
DANIEL P. WEICK
JUSTIN A. COHEN
WILSON SONSINI GOODRICH & ROSATI, P.C.
1301 Avenue of the Americas, 40th Floor
New York, New York 10019
(212) 497-7700
jjacobson@wsgr.com

SUSAN A. CREIGHTON
SCOTT A. SHER
BRADLEY T. TENNIS
ELYSE DORSEY
WILSON SONSINI GOODRICH & ROSATI, P.C.
1700 K Street, N.W., Fifth Floor
Washington, D.C. 20006
(202) 973-8800

Attorneys for Respondents

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ADDENDUM

ANNEX A

Excerpt from Br. for Plaintiffs-Appellees at 25-26:

Appellants repeatedly assert that Chinese law mandated the challenged conduct in this case, but Chinese law only required the Chamber and its Subcommittee to "actively coordinate to set vitamin C export prices and quantities." Br.12. The Ministry has made no argument about the specific agreements proven at trial. Instead, the Ministry has represented that Subcommittee members were required to engage in a pre-designated process if called upon by the Chamber, but not to reach any particular result. A-205-07.

ANNEX B

Point II.E of Br. for Plaintiffs-Appellees at 45-46:

E. Dismissal Is Not Required as a Matter of Comity.

To trigger the discretionary comity doctrine, a "true conflict" must exist between U.S. and foreign law such that compliance with the laws of both countries is impossible. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798 (1993). Consistent with *Hartford Fire*, foreign law did not require Appellants "to act in some fashion prohibited by the law of the United States." *Id.* at 799. Appellants argue that a "true conflict" is not required to trigger the comity doctrine under *Hartford Fire*, but cite only two post-*Harford Fire* cases, neither of which supports their argument. *Trugman-Nash, Inc. v. New Zealand Dairy Bd.*, 954 F. Supp. 733, 736 (S.D.N.Y. 1997) (true conflict existed); *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 847 (9th Cir. 1996) (no true conflict existed).

Here, compliance with both the Sherman Act and Chinese law was not only possible, it happened: Chinese vitamin C manufacturers did not engage in price fixing prior to the end of 2001; they engaged in price wars until the cartel was formed. A-2005-34; A-176 ("Between May 2000 and late December 2001, vitamin C in [China] experienced the second 'price war' since 1995"). The companies and the Chamber also stopped meeting after 2008. A-1827, lines 2-9.

Appellants wrongly claim the district court held that *Hartford Fire* overruled *O.N.E. Shipping*, *Hunt*, *Timberlane*, and *Mannington Mills*. Br.40-41. All the district court did was note that whether a court must consider the *Timberlane* factors in a comity analysis

absent a true conflict is "unclear" after *Hartford Fire*. SPA-66. The court then expressly considered the *Timberlane* factors, and concluded that they do not support abstention unless the government of China actually compelled the alleged conduct. SPA-67-68.